

Message

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**From:** Pic, Jordan [pic.jordan@epa.gov]  
**Sent:** 11/5/2020 3:18:51 PM  
**To:** Vella, Sophia [Vella.Sophia@epa.gov]  
**CC:** Carter, Brittany S. [carter.brittany@epa.gov]; Brazauskas, Joseph [brazauskas.joseph@epa.gov]; Mejias, Melissa [mejias.melissa@epa.gov]; Wildeman, Anna [wildeman.anna@epa.gov]; Fotouhi, David [Fotouhi.David@epa.gov]; Forsgren, Lee [Forsgren.Lee@epa.gov]; Spraul, Greg [Spraul.Greg@epa.gov]; Ross, David P [ross.davidp@epa.gov]; Servidio, Cosmo [Servidio.Cosmo@epa.gov]; Aguirre, Janita [Aguirre.Janita@epa.gov]; Dickerson, Aaron [dickerson.aaron@epa.gov]; Hyman, Alana [Hyman.Alana@epa.gov]; Scott, Corey [scott.corey@epa.gov]  
**Subject:** Materials for Call with AG Morrissey  
**Attachments:** 230 Call with AG Morrissey FINAL.docx; Attachment A OAR memo on the Petition for Domestic Integrated Iron and Steel Production Memo.docx; Attachment B OW and OGC memo on Spruce Mine Takings Litigation.docx; Attachment C WV Va IS petition.pdf; Attachment D Signed West Virginia Attorney General Letters AX-18-000-6666.pdf

Hi Sophia,

Thank you for your help in getting this call scheduled today. Attached are the materials for Administrator Wheeler.

Best,  
Jordan

Jordan Pic  
Special Advisor, Intergovernmental Relations  
U.S. Environmental Protection Agency

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# Before the United States Environmental Protection Agency

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STATE OF WEST VIRGINIA,

to

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, SCOTT PRUITT,  
Administrator of the United States Environmental Protection Agency,  
and WILLIAM L. WEHRUM, Administrator of the United States  
Environmental Protection Agency for Air and Radiation

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On Petition for Rulemaking

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## **PETITION FOR RULEMAKING TO PROTECT DOMESTIC INTEGRATED IRON AND STEEL PRODUCTION**

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Patrick Morrissey  
ATTORNEY GENERAL OF  
WEST VIRGINIA  
Anthony Martin  
Chief Deputy Attorney General  
State Capitol Building 1, Room 26-E  
Charleston, WV 25305  
Tel: (304) 558-2021  
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April 18, 2018

*Counsel for Petitioner  
State of West Virginia*

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The State of West Virginia, by and through Attorney General Patrick Morrisey, petitions the Environmental Protection Agency to establish when a project qualifies for the “routine maintenance, repair, and replacement” exemption from New Source Review. Specifically, the State respectfully requests that the Agency promulgate a rule:

- Clarifying that replacing components consumed or degraded by the normal operation of a source, or remediating “wear-and-tear” arising from the normal operation of a source, qualifies as “maintenance, repair, [or] replacement;”
- Clarifying that the determination of whether “maintenance, repair, or replacement” is “routine” will be based on common practices within the industry and source category; and
- Repudiating the inconsistent, erroneous, and unlawful positions that the Agency previously asserted in litigation against the steel and electricity industries.

This petition is authorized by 5 U.S.C. § 553(e).

## **I. SUMMARY AND STATEMENT OF INTEREST**

The State of West Virginia, by and through Attorney General Patrick Morrisey, has been a consistent leader in protecting West Virginia coal miners and coal jobs from suffocating regulatory overreach. When previous administrations took an aggressive and heavy-handed position against coal miners, the Attorney General’s office struck back with litigation that halted regulators in their tracks. Now that President Trump has made it a priority to bring back coal jobs, our office stands ready to help roll back the convoluted policies that are standing in the way.

President Trump has already made great strides revitalizing the thermal coal industry. Exec. Order No. 13783, 82 Fed. Reg. 16093 at § 2(a) (Mar. 28, 2017). Moreover, his work bolstering American manufacturing creates a special nexus with West Virginia coal. Specifically, with the high-grade metallurgical coal, or “met coal,” that is found extensively in West Virginia. Met coal is an essential component of reducing iron ore into steel. *See, e.g.*, Presidential Memorandum on Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing, 82 Fed. Reg. 8667 (Jan. 24, 2017). Fortunately, President Trump has made revitalizing domestic steel production a priority of both his economic and national security agenda. Presidential Memorandum for the Secretary of Commerce on Steel Imports and Threats to National Security, 2017 WL 1405455 (Apr.

20, 2017). From a regulatory standpoint, there is considerable room for improvement in the domestic steel industry. “In past years, the aggressive environmental regulatory programs at the federal and state levels created a competitive disadvantage for manufacturers, endangering jobs and adding significant costs and uncertainty to basic operations while providing only marginal environmental benefits in exchange.” AMERICAN IRON AND STEEL INSTITUTE, 2018 PUBLIC POLICY AGENDA 8 (Feb. 15, 2018), <https://www.steel.org/~media/Files/AISI/Reports/AISI-2018-Public-Policy-Agenda.pdf>. In this spirit, the State is requesting the Agency implement a new rule taking aim at a convoluted policy standing in the way of President Trump’s steel agenda: “New Source Review” permitting under the Clean Air Act.

New Source Review is an expansive process, both in terms of its scope and the burdens it imposes on industry. It applies to the construction of nearly any industrial facility, including power plants and steel mills. Moreover, it applies whenever such a facility undergoes “modification,” which can mean “any physical change . . . which increases emissions” of air pollutants. 42 U.S.C. § 7411(a)(4). Obtaining a construction or modification permit requires significant capital expense, but the mere process of applying for a permit is an exhaustive, expensive, and complicated.

To prevent New Source Review from stifling the regular operations of existing industrial facilities, “routine maintenance, repair, and replacement” is exempted from the definition of “physical change.” 40 C.F.R. §§ 51.165(a)(1)(v)(C), 52.21(b)(2)(iii)(a). Thus, ordinary upkeep projects will not trigger the heavy burden of New Source Review. Unfortunately, industries cannot rely on this exemption due to the inconsistent, case-by-case basis on which the Agency applies it. In addition to the Agency shifting its definition of these terms, courts have also imposed erroneous and unreasonable limits on the exemption.

In one particularly egregious case, the Agency initiated litigation against the owners of a steel mill after owners replaced the lining of the mill’s blast furnace. Because reducing iron ore into steel involves extreme temperatures and corrosive chemicals, furnace linings are subject to considerable wear and tear. AISE STEEL FOUNDATION, THE MAKING, SHAPING, AND TREATING OF STEEL 245 (Richard J. Fruehan ed., 11th ed. 1999). Although blast furnaces can remain operational for centuries, even the most durable cooling components must be replaced every ten to fifteen years. *Id.* at 679. This is an unavoidable and recurring process for all blast furnaces, and

involves no mechanical or operational changes, but the Agency treated it as a “modification” rather than “routine maintenance and repair.”

The Agency’s practice of subjecting routine maintenance and repair New Source Review has gone on too long, and correcting this flawed approach is consistent with President Trump’s directive to pursue “reductions in regulatory burdens affecting domestic manufacturing.” Memorandum on Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing, 82 Fed. Reg. 8667 (Jan. 24, 2017). Accordingly, the State of West Virginia respectfully requests the Agency issue a new rule clarifying standards for the “routine maintenance, repair, and replacement” exemption that, at a minimum, encompass lining repairs for blast furnaces.

## II. BACKGROUND

In 1977, Congress amended the Clean Air Act to impose a new permitting system on construction projects: “New Source Review.” Clean Air Act Amendments of 1977, Pub. L. No 95-95, §§ 127, 129, 91 Stat. 685, 731–42, 745–51 (codified as amended at 42 U.S.C. §§ 7470–7479, 7501–7508). New Source Review encompasses two permitting programs that govern the construction of new stationary sources of air pollution, depending on where the source will be constructed. In regions where National Ambient Air Quality Standards have not been met, projects must obtain a “Nonattainment New Source Review” (“NNSR”) permit. 42 U.S.C. §§ 7501–15. In regions where air quality standards have been met, projects must obtain a “Prevention of Significant Deterioration” (“PSD”) permit. 42 U.S.C. §§ 7470-92.

Although there are differences between NNSR and PSD permitting, both forms of New Source Review have largely similar scopes. *See, e.g., Env’t Defense v. Duke Energy Corp.*, 549 U.S. 561, 568-570 (2007) (describing narrow distinctions between PSD and NNSR terminology). For example, both systems can apply to *modifications* of existing sources, and not merely the construction of new sources. 42 U.S.C. §§ 7479(2)(C), 7502(c)(5). In both systems, “modification” is defined as “any physical change in, or change in the operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.” 42 U.S.C. §§ 7472(2)(C), 7501(4) (both referencing 42 U.S.C. § 7411(a)). To clarify that this broad language is not all-encompassing, the Agency has long maintained that performing “maintenance, repair, and replacement” does not constitute a “physical

change,” and thus does not trigger new source review, if the activity is “routine.” 40 C.F.R §§ 51.165(a)(1)(v)(C), 52.21(b)(2)(iii)(a). Determination of whether the “routine maintenance” exception applies is delegated to the Administrator on a “case-by-case” basis. *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 910-11 (7th Cir. 1990) (“*WEPCO*”); *see also United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 855 (S.D. Ohio 2003).

The importance of the routine maintenance exemption is underscored by the onerous and uncertain nature of New Source Review. For example, PSD permitting “imposes numerous and costly requirements on those sources that are required to apply for permits.” *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2443 (2014) (“*UARG*”). To obtain a permit under the PSD program, “the applicant must make available a detailed scientific analysis of the source’s potential pollution-related impacts, demonstrate that the source will not contribute to the violation of any applicable pollution standard, and identify and use the ‘best available control technology’ for each regulated pollutant it emits.” *UARG*, 134 S. Ct. at 2443 (citing § 7475(a)(3), (4), (6), (e)). For example, the Agency has acknowledged “that PSD review is a ‘complicated, resource-intensive, time-consuming, and sometimes contentious process’ suitable for ‘hundreds of larger sources,’ not ‘tens of thousands of smaller sources.’” *Id.* (quoting 74 Fed. Reg. 55304, 55321–55322). Similarly, under NNSR permitting, an applicant must show that the project will comply with “the most stringent emission limitation” imposed by States or “achieved in practice” for sources in that category. 42 U.S.C. §§ 7501(3), 7503(a)(2). Although this presents a lower standard, the process imposes similar costs and uncertainties and is still stringent.

This uncertainty has been exacerbated by the inconsistent interpretations and applications of the exemption under previous administrations. The Agency initially argued that a project qualifies as “routine” based on the common practices *within a particular source category*. *WEPCO*, 893 F.2d at 911-12; *see also* 57 Fed. Reg. 32,314, 32,326 (July 21, 1992). This approach was consistent with the Agency’s definition of “modification” under the New Source Performance Standards program, which was expressly cross-referenced by the New Source Review statutes. 40 C.F.R. § 60.14(e)(1) ; *see also* 42 U.S.C. §§ 7501, 7479. Notwithstanding this clear indication of uniformity, the Agency later pivoted to a more restrictive interpretation for New Source Review exemptions that only considered routines “*for a generating unit.*” *United States v. S. Ind. Gas & Elec. Co.*, 245 F. Supp. 2d 994, 1008 (S.D. Ind. 2003) (emphasis added).

Recognizing the importance of the routine maintenance and repair exemption, the Agency previously attempted to clarify its scope. In 2003, the Agency promulgated a rule that defined “routine maintenance, repair, and replacement” to include “the replacement of any component of a process unit with an identical or functionally equivalent component(s),” within certain cost limitations. 68 Fed. Reg. at 61,272 (enacting 40 C.F.R. § 52.21(cc)). In 2006, this rule was vacated by the D.C. Circuit Court, based on a broad reading of the Clean Air Act. *New York v. EPA*, 443 F.3d 880, 883 (D.C. Cir. 2006) (“Hence, the ERP [Equipment Replacement Rule] would allow sources to avoid NSR when replacing equipment under the twenty-percent cap notwithstanding a resulting increase in emissions. The court stayed the effective date of the ERP on December 24, 2003. We now vacate the ERP because it is contrary to the plain language of section 111(a)(4) of the Act[.]”). This broad reading gave the term “any physical change” an “expansive” and “indiscriminate[]” application, *Id.* (quotations omitted), and was subsequently invoked in litigation by the Agency against steel producers in Region V.

Moreover, this broad method of reading the Clean Air Act has since been repudiated by the Supreme Court. *UARG*, 134 S. Ct. at 2439-40. In light of past confusion and this recent repudiation, it is appropriate for the Agency to clarify the scope of the routine maintenance exemption to provide clarity and certainty in the coal industry.

### **III. THE REQUESTED RULE**

The State of West Virginia respectfully requests the Agency provide clear, reasonable, and predictable rules that will establish the scope of the routine maintenance and repair exemption. There is currently no rule defining the precise scope of “routine,” “maintenance,” or “repair.” Indeed, the Agency has historically treated this as a “case-by-case” determination based on a range of factors, including “the nature, extent, purpose, frequency, and cost of the work.” *WEPCO*, 893 F.2d at 910. The resulting unpredictability and confusion has provoked litigation, which in turn has only further confused the issue. The State of West Virginia proposes a twofold solution to this confusion: clarifying the methodology used to determine both when work is “routine,” and when it is “maintenance [or] repair.”

With respect to “routine,” it should be clarified that the nature and frequency of the work is determined by reference to the source category or industry overall, rather than the specific source in question. Work that is regular, predictable, and recurring in the industry should be considered *per*

se “routine.” To the extent this is not the case, or if the facts of a particular application are unclear, factors such as cost should then be considered.

Similarly, “maintenance and repair,” should be consistently defined based on the particular needs of an industry and source category. If the nature and purpose of a project centers on remediating the effects of unavoidable wear-and-tear caused by the ordinary operation of the type of source in question, then the work should be considered *per se* “maintenance.” Similarly, replacing components that are necessarily damaged by the ordinary operation of sources in the category should be considered *per se* “repair.” The cost and extent of such projects should not predominate over their nature and purpose, if the nature and purpose make it clear the project is “maintenance [or] repair.”

By way of example, in the context of blast furnaces, wear and tear on the interior of a furnace chamber is an unavoidable consequence inherent in its operation. AISE STEEL FOUNDATION, THE MAKING, SHAPING, AND TREATING OF STEEL 245 (Richard J. Fruehan ed., 11th ed. 1999). Replacing worn out lining is both necessarily predictable and recurring. Such repairs effect no substantive change from the furnace as originally designed. Accordingly, other factors, such as the cost and scope of relining need not be considered, and certainly should not override the straightforward, common-sense conclusion suggested by the project’s nature and purpose.

Promulgating the requested rule is comfortably within the Administrator’s authority, and the rule conforms the Agency’s practice to Supreme Court decisions interpreting the scope of the Clean Air Act. Moreover, because the uncertainty and unlawful overreach of previous administrations in this area has had a particularly harmful effect on the domestic steel and coal industries, the requested rule will advance President Trump’s goal of revitalizing these industries.

#### **A. The Administrator Has Authority To Promulgate The Requested Rule.**

The Administrator has well-established authority to interpret the scope of “physical change” via the routine maintenance and repair exemption. Under *Chevron*, “when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity” and the agency need only act “reasonably” in order to stay within its statutory authority. *UARG*, 134 S. Ct. at 2439 (citing *Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013)). The Clean Air Act does not specify a meaning of “physical change.” Moreover, the Agency has

consistently maintained, and courts have consistently agreed, that the Administrator may interpret the applicability of the routine maintenance exemption “on a case-by-case basis.” *WEPCO*, 893 F.2d at 910-11; *see also Ohio Edison Co.*, 276 F. Supp. 2d at 855.

Although there is little dispute that the Administrator can promulgate a legislative rule in this context, there has been dispute regarding the level of deference a court should afford Agency interpretations of such rules. Courts have pointed to the Agency’s inconsistent interpretation of the routine maintenance exemption—particularly with regard to whether “routine” is determined by reference to specific sources or the source category overall—when granting limited or no deference to the Agency’s interpretation. *See, e.g., United States v. E. Ky. Power Coop.*, 498 F. Supp. 2d 976, 993 (E.D. Ky. 2008) (citing *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993)); *see also United States v. Ala. Power Co.*, 372 F. Supp. 2d 1283, 1306 (N.D. Ala. 2005) order vacated in part, No. 2:01-cv-00152, 2008 WL 11383702 (N.D. Ala. Feb. 25, 2008); *Pennsylvania et al. v. Allegheny Energy, Inc. et al*, No. 05-885, 2008 WL 960100 at \*7 (W.D. Pa. Sep. 2, 2008) (subsequent history omitted).

However, there are two reasons why the interpretation advanced by the requested rule would not be susceptible to such judicial criticism. *First*, the requested rule returns the Agency’s interpretation of “routine” to its original position, and “closer to the enactment of the governing statute.” *General Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976). When conflicting interpretations are advanced by an agency, the interpretation that was adopted closer to the enactment of the governing statute is given more deference than subsequent, conflicting interpretations. *Id.*

*Second*, a changing agency interpretation is entitled to deference if the change is supported by a “reasoned justification.” *See, e.g., N.L.R.B. v. Webcor Packaging, Inc.*, 118 F.3d 1115, 1119 n.4 (6th Cir. 1997); *Sacred Heart Med. Ctr. v. Sullivan*, 958 F.2d 537, 544 (3d Cir. 1992). Here, the requested rule would update the Agency’s interpretation to reflect new Supreme Court precedent, which is a “reasoned justification.” The narrow interpretation suggested by *New York v. EPA* was not informed by the Supreme Court’s analysis in *UARG* or *Env’t Defense v. Duke Energy Corp.* The Clean Air Act “does not strip EPA of authority to exclude” activities from the ambit of the PSD permitting requirement “where their inclusion would be inconsistent with the statutory scheme.” *UARG*, 134 S. Ct. at 2441.

**B. The Requested Rule Reasonably Conforms To  
The Text and Purpose Of The Clean Air Act.**

Applying the routine maintenance and repair exemption to all industry-standard replacement projects is consistent with a proper understanding of New Source Review. A plain reading of the Clean Air Act and related regulations certainly suggests that relining a furnace to replace cracked, worn-out bricks is a “repair” rather than a “physical change.” 42 U.S.C. § 7411(a)(2). Moreover, it is unreasonable to interpret the phrase “any physical change” to mean any physical change “whatsoever.” *UARG*, 134 S. Ct. at 2440. “[R]easonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole.” *Id.* at 2442 (quoting, in part, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Just like the phrase “any air pollutant,” the phrase “any physical change” requires “a narrower, context-appropriate meaning.” *Id.* at 2439.

Here, “physical change” is used to describe a “modification” that is included in the same permitting scheme as the construction of an entirely new source. The “elaborate, burdensome permitting process” created for constructing new sources can reasonably extend to projects that fundamentally alter an existing source, which may be effectively indistinguishable from creating a new source. *Id.* at 2440. Similarly, a “change in the method of operation” of a source converts the fundamental nature of the source, analogous to creating a new source, and is consequently included as a “modification” that can trigger New Source Review. 42 U.S.C. § 7411(a)(4).

The common thread between constructing a new source, making major modifications to existing sources, and altering the actual operation of a source is observable, fundamental shifts from the *status quo*. Viewed in this context, “physical change” cannot readily encompass projects that are undertaken for the sole purpose of remediating ordinary wear-and-tear and leaving the essential nature of sources unchanged.

Some interpretations have ignored the limited context of New Source Review by emphasizing the second element of “modification:” an “increase[] in the amount of any air pollutant” emitted by the modified source. *Id.* For example, before *UARG* was decided, the D.C. Circuit held that the routine maintenance and repair exemption only applied to physical changes that had a “*de minimis*” effect on emissions. *New York*, 443 F.3d at 889. Although it is correct to note that projects causing *de minimis* emissions changes likely do not trigger New Source Review, it is incorrect to allow the “emissions”

requirement to limit the scope of the “physical change” requirement. A “modification” consists of two independent elements: a change in the source itself, whether physical or operational, and an emissions change associated with the change in the source. *Duke*, 549 U.S. at 578-79. Thus, emissions increases are irrelevant if the nature and purpose of projects do not involve physical or operational changes in the context of New Source Review.

Conversely, other interpretations have emphasized the scope and cost of projects over nature and purpose. Although these factors may be informative in edge cases, they should not control when the nature and purpose of a project is clearly to provide routine maintenance or repair. For example, courts have suggested the “technology-forcing” objective of the Clean Air Act means that projects with expansive scopes should not be considered “routine maintenance and repair.” *WEPCO*, 893 F.2d at 909-10. In this framework, New Source Review should apply whenever “construction” is undertaken, as this is when “pollution control measures . . . can be most effective.” *Id.* at 909. This interpretation of “modification” is both under and over-inclusive. It does not account for a change in the “method of operation,” involving no construction whatsoever, which would expressly be included in the definition of “modification.” 42 U.S.C. § 7411(a)(4). At the same time, it suggests that deconstructing and reconstructing a source, using the same parts and effecting no physical or operational change whatsoever, would nonetheless constitute a “modification” due to the amount of construction involved. Similarly, a stayed Agency rule suggests that cost alone can be a dispositive factor. 40 C.F.R. §§ 51.165(a)(1)(v)(C), 52.21(b)(2)(iii)(a). It strains credulity to suggest that an otherwise routine furnace relining should be treated as a modification if the price of bricks increased.

### **C. The Requested Rule Advances The Administration’s Goals.**

The Agency’s inconsistent, “case-by-case” application of the routine maintenance and repair exemption from New Source Review hurts every industry, and has led to unlawful and overreaching litigation against the steel industry. Allowing this to continue flatly contradicts President Trump’s emphatic declaration that the domestic steel industry is a “critical element[] of our manufacturing and defense industrial bases.” Presidential Memorandum for the Secretary of Commerce, 2017 WL 1505901, at §1 (Apr. 27, 2017).

Although the Agency can use its enforcement discretion to avoid reinforcing the mistakes of the past, it is necessary to “go beyond merely

exercising enforcement discretion” in order to “mitigate the unreasonableness of” past applications. *UARG*, 134 S. Ct. at 2445. If no permanent solution is put in place, subsequent administrations can invoke their own enforcement discretion to revert to old practices. As long as the specter of inconsistency lingers, investment in steel and iron works remains risky and stumps long term growth. Even in the immediate term, the Agency’s enforcement discretion does not protect against the prospect of citizen suits. *Id.* Accordingly, the only way to effectively resolve the issue is by issuing a legislative rule.

Resolving this confusion will allow domestic steel producers to repair their furnaces and provide certainty that their furnaces can continue operating, which will in turn increase the demand for West Virginian met coal. Accordingly, by resolving this uncertainty and removing the looming threat of litigation from the domestic steel industry, the requested rule will advance several elements of President Trump’s agenda, including fostering the growth of our economy, getting miners back to work, and providing essential steel for our nation’s defense and infrastructure.

#### **IV. CONCLUSION**

President Trump’s pro-jobs agenda has identified the singular importance of saving the American coal miner from extinction. Similarly, his “America First” trade policy is revitalizing domestic industries of all types, and in particular the American steel industry. The requested rule is in lock-step with the President’s agenda, and implementing the rule will indisputably help make America great again.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

May 7, 2018

OFFICE OF  
AIR AND RADIATION

The Honorable Patrick Morrissey  
Attorney General of West Virginia  
State Capitol Complex  
Building 1, Room 26-E  
Charleston, West Virginia 25305

Dear Mr. Morrissey:

Thank you for your "Petition for Rulemaking to Protect Domestic Integrated Iron and Steel Production" (April 18, 2018) in which you have asked the U.S. Environmental Protection Agency (EPA) to initiate a notice and comment rulemaking process to promulgate a rule that would establish when maintenance, repair, and replacement activity undertaken at an existing major stationary source would be deemed to be "routine" under EPA's regulations implementing the New Source Review (NSR) program. As you are likely aware, taking measures to improve the NSR program is an important priority of the Administrator and is being pursued in order to achieve our goal of streamlining permitting and reducing regulatory burdens on domestic manufacturing while maintaining environmental protections. We have already taken several steps to improve implementation of the NSR program and continue to work on additional guidance and regulatory actions in this area based on stakeholder input and our own assessment of priorities.

We appreciate not only your interest in the NSR program generally but also the suggestions made in your petition, and we will keep them under consideration as we move forward with this important work.

Sincerely,

A handwritten signature in black ink, which appears to read "W L Wehrum", is positioned above the typed name.

William L. Wehrum  
Assistant Administrator

cc: Anthony Martin, Chief Deputy Attorney General



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

May 7, 2018

OFFICE OF  
AIR AND RADIATION

The Honorable Anthony Martin  
Chief Deputy Attorney General  
of West Virginia  
State Capitol Complex  
Building 1, Room 26-E  
Charleston, West Virginia 25305

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William L. Wehrum  
Assistant Administrator

cc: Patrick Morrissey, Attorney General



**U.S. ENVIRONMENTAL PROTECTION AGENCY  
ADMINISTRATOR ANDREW WHEELER**

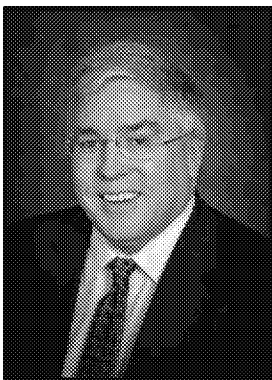
**MEMORANDUM FOR CALL WITH WEST VIRGINIA ATTORNEY GENERAL  
PATRICK MORRISEY**

**Date of Call: Thursday, November 5<sup>th</sup>**

**Time: 2:30pm**

**Call-in information: Ex. 6 Personal Privacy (PP)**

**BIO**



Morrissey was elected as the Attorney General for the State of West Virginia on November 6, 2012, and was sworn into office on January 14, 2013. Morrissey graduated with honors from Rutgers College in 1989 earning bachelor's degrees in history and political science. He received a juris doctor from Rutgers Law School-Newark in 1992. Morrissey is the first Republican to serve as Attorney General in West Virginia since 1933, and as a resident of Harpers Ferry, Morrissey is also the first Attorney General from Jefferson County in the state's history. In practice since 1992, Morrissey worked on many high profile health care matters in private practice prior to serving as Attorney General, and possesses a broad array of experience on regulatory issues, Medicare, Medicaid, policy, fraud and abuse investigations, legislative matters, strategic counseling, and legal and policy challenges to federal statutes and regulations. Between 1999 to 2004, Morrissey served as the Deputy Staff Director and Chief Health Care Counsel to the House of Representatives Energy and Commerce Committee. Morrissey served as the principal liaison for the House of Representatives Energy and Commerce Committee on health care issues to the White House, the U.S. Senate, the House of Representatives, the Department of Health and Human Services and the Centers for Medicare and Medicaid Services. Morrissey is married and has a stepdaughter.

**PURPOSE**

Attorney General Morrissey has requested a call with Administrator Wheeler to discuss two issues. OGC, OW, OAR, and Region 3 have prepared the attached briefing materials on these issues:

- Spruce Mine 404(C) Final Determination: United Affiliates/Mingo Logan Litigation.

- State of West Virginia Petition to Protect Domestic Integrated Iron and Steel Production.

## AW ENGAGEMENTS

- N/A

## CORRESPONDENCE

- May 15, 2020 Attorney General Morrisey cosigned a letter to Administrator Wheeler with Attorneys General Jeff Landry (LA), Sean Reyes (UT), Leslie Rutledge (AR), Mike Hunter (OK), Bridget Hill (WY), Ken Paxton (TX) re: in support of requests of several governors to waive the renewable fuel program requirements in section 211(0)(2) of the Clean Air Act.
- February 26, 2019 Attorney General Morrisey cosigned a letter to Administrator Wheeler with Attorneys General Jeff Landry (LA), Alan Wilson (SC), Steve Marshall (AL), Ken Paxton (TX), Tim Fox (MT), Doug Peterson (NE) re: cooperative federalism principles and section 401 of the Clean Water Act.
  - May 20, 2019 Assistant Administrator David Ross replied.
- April 18, 2018 Attorney General Morrisey filed a petition to the EPA re: Rulemaking to Protect Domestic Integrated Iron and Steel Production.
  - May 7, 2018 Assistant Administrator William Wehrum responded with acknowledgment of the petition
- March 7, 2017 Attorney General Morrisey cosigned a letter to Administrator Pruitt with Attorneys General Stephen Marshall (AL), Mark Brnovich (AZ), Leslie Rutledge (AR), Christopher Carr (GA), Curtis Hill (IN), Derek Schmidt (KS), Matt Bevin (KY), Jeff Landry (LA), Phil Bryant (MS), John Hawley (MO), Tim Fox (MT), Douglas Peterson (NE), Adam Laxalt (NV), Wayne Stenehjem (ND), Mike Hunter (OK), Alan Wilson (SC), and Peter Michael (WY) re: Request to reexamine delegation of certain environmental regulation authority to the States in accordance with the express terms of the Clean Air and Water Acts.
- March 1, 2017 Attorney General Morrisey cosigned a letter to Administrator Pruitt with Attorneys General Ken Paxton (TX), Steven Marshall (AL), Mark Brnovich (AZ), Derek Schmidt (KS), Matt Bevin (KY), Jeff Landry (LA), Phil Bryant (MS), Tim Fox (MT), Mike Hunter (OK), and Alan Wilson (SC) re: Request to Suspend and Withdraw the EPA's Information Collection Request for Existing Oil and Gas Facilities, EPA ICR No. 2548.01.

## ***Attachments:***

- ***Attachment A: OAR memo on the Petition for Domestic Integrated Iron and Steel Production.***
- ***Attachment B: OW and OGC memo on Spruce Mine 404 (C) Final Determination: United Affiliates/Mingo Logan Litigation***

- *Attachment C: WVa IS Petition*
- *Attachment D: Signed West Virginia Attorney General Letters*



**U.S. ENVIRONMENTAL PROTECTION AGENCY  
ADMINISTRATOR ANDREW WHEELER**

**MEMORANDUM FOR BRIEFING WITH ATTORNEY GENERAL PATRICK  
MORRISEY**

**Date of Meeting: TBD**

**TOPICS FOR DISCUSSION**

**1. ISSUE/REQUEST: STATE OF WEST VIRGINIA PETITION TO PROTECT  
DOMESTIC INTEGRATED IRON AND STEEL PRODUCTION**

**BACKGROUND:** On April 18, 2018, the State of West Virginia petitioned EPA to promulgate a rule that would establish when a project undertaken at a major stationary source qualifies as “routine maintenance, repair and replacement” activity (RMRR) under the New Source Review (NSR) rules. Under those rules, a “physical change or change in the method of operation” is defined as *not* including activities deemed to be RMRR. *See, e.g.*, 40 C.F.R. § 52.21(b)(2)(iii)(a). As a consequence, an RMRR project can never constitute a “major modification” under the NSR rules, regardless of any emissions increase that may result from such a project. The current NSR rules, however, do not contain a definition of the term “routine maintenance, repair and replacement.”

In its petition, “Petition for Rulemaking to Protect Domestic Integrated Iron and Steel Production,” a copy which is attached, West Virginia invokes E.O. 13783 and the Trump Administration’s role in revitalizing the thermal coal industry, in which West Virginia has significant equities. High grade metallurgical coal, or “met coal” is mined in West Virginia and is a component of reducing iron ore into steel. Specifically, the petition requests that EPA undertake a notice-and-comment rulemaking that would serve to:

- Establish that replacing components consumed or degraded by the normal operation of a source, or remediating “wear-and-tear” arising from the normal operation of a source, qualifies as “maintenance, repair, [or] replacement;”
- Establish that the determination of whether “maintenance, repair, or replacement” is “routine” will be based on common practices within the industry and source category; and
- Repudiate what the petition characterizes as the “inconsistent, erroneous, and unlawful positions that the Agency previously asserted in litigation against the steel and electricity industries.”

The West Virginia petition was addressed jointly to then-Administrator Pruitt and then-Assistant Administrator (AA) for the Office of Air and Radiation Wehrum.

Then-AA Wehrum acknowledged the Agency's receipt of the petition in letters dated May 7, 2018, copies of which is attached. Then-AA Wehrum wrote that "taking measures to improve the NSR program is an important priority of the Administrator," and that these were "being pursued in order to achieve our goal of streamlining permitting and reducing regulatory burdens on domestic manufacturing while maintaining environmental protections." Then-AA Wehrum expressed the Agency's appreciation for "the suggestions made in your petition," while committing to "keep them under consideration as we move forward with this important work."

## Ex. 5 Attorney Client (AC)

**Ex. 5 Attorney Client (AC)** During the second Bush Administration, EPA promulgated a rule addressing RMRR. Known as the "Equipment Replacement Provision" (ERP) rule, it was essentially the sort of rule which West Virginia seeks in its petition. *See* 68 Fed. Reg. 61,247 (Dec. 26, 2003). The ERP rule was ultimately found to be unlawful and was vacated by the U.S. Court of Appeals for the District of Columbia Circuit. *See State of New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006) (*New York II*).

In its petition, West Virginia acknowledges the *New York II* case and the fact that, in vacating the ERP rule, the D.C. Circuit had construed the Clean Air Act's definition of "modification" (*see* 42 U.S.C. § 7411(a)(4)) in terms that indicate that only those activities that are of a *de minimis* nature can escape consideration as a "physical change," as that term is used in the statutory definition of "modification." The example offered in the West Virginia petition of the type of project that the requested rule should define as constituting RMRR and thus not a "physical change" – *i.e.*, replacing the lining of a steel mill blast furnace – would not be considered a *de minimis* project under the *New York II* decision, given the scope and cost of such a project. West Virginia argues, however, that the later decision of the U.S. Supreme Court in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) (*UARG*), provides a basis for believing that the "broad reading of the Clean Air Act" by the D.C. Circuit in *New York II* "has since been repudiated." Petition at 5, *citing UARG*, 134 S. Ct. at 2439-40.

## Ex. 5 Attorney Client (AC)

RECOMMENDATION BY OAR:

## **Ex. 5 Deliberative Process (DP)**

PROPOSED/ REQUIRED DEADLINE: None.

## **Ex. 5 Deliberative Process (DP)**

**SPRUCE MINE 404(C) FINAL DETERMINATION:  
UNITED AFFILIATES/MINGO LOGAN LITIGATION**

**Background:**

In early 2007, the U.S. Army Corps of Engineers (Corps) issued a CWA Section 404 permit for the discharges of fill material associated with the Spruce No. 1 mountaintop removal coal mine project in West Virginia to Mingo Logan Coal Co. (Mingo Logan) a subsidiary of Arch Resources, Inc. The Corps permit was immediately challenged by NGOs. In September 2009, EPA requested that the Corps suspend, modify, or revoke its permit for Spruce No. 1. After the Corps indicated that it would not reconsider its permit, in October 2009, pursuant to applicable regulations, EPA initiated the Section 404(c) process. On January 13, 2011, EPA's Assistant Administrator for Water signed a Final Determination under CWA Section 404(c) withdrawing specification of certain disposal sites for discharges of fill material associated with the Spruce No. 1 Mine.

**2011 Spruce No. 1 CWA 404(c) Final Determination:**

- **Statutory Text:** CWA Section 404(c) authorizes the Administrator “to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site” as well as to “deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.”
- **EPA's Historical Use of 404(c):** EPA has completed 13 Section 404(c) final determinations in the history of the CWA.
- **Post-permit Issuance 404(c) actions:** Four of the 13 times EPA has used its 404(c) authority involved circumstances where permits had already been issued (1981, 1988, 1989, and 2011). Spruce was the last of these four.
- **Project Dimensions:** The Spruce No. 1 Mine, located northeast of Blair in Logan County, West Virginia, if fully constructed, would be approximately 2,278 acres (about 3.5 square miles) and would reduce the height of the mountain by approximately 400 to 450 feet. It would deposit 110 million cubic yards of excess spoil into adjacent valleys, burying approximately 7.48 miles of streams in three watersheds (Seng Camp Creek, Pigeonroost Branch, and Oldhouse Branch).
- **Corps Permit Issuance:** The Corps issued a permit pursuant to CWA Section 404 for the discharges of fill material associated with this project in early 2007.

- **Corps Permit Challenged:** The Corps permit was immediately challenged by NGOs. Mingo Logan and the NGOs entered into a “standstill agreement” under which Mingo Logan confined its discharges of fill material to the Seng Camp Creek watershed area, subject to notification to the environmental groups.
- **Substantive New Science Made Available:** During the time-period following permit issuance, substantive new information became available highlighting the importance of headwater streams like Pigeonroost Branch and Oldhouse Branch, and concerns that impacts to headwater streams from the Spruce No. 1 Mine cannot easily be remediated.
- **CWA 404(c) Process Initiated:** In September 2009, EPA requested that the Corps suspend, modify, or revoke its permit for Spruce No. 1 for discharges into Pigeonroost Branch and Oldhouse Branch. After the Corps indicated that it would not reconsider its permit, in October 2009, pursuant to applicable regulations, EPA initiated the Section 404(c) process. As part of the process, EPA engaged in negotiations with the mineral owners and Mingo Logan.
- **EPA 404(c) Process:** Following a public process that included a public hearing and receipt of approximately 50,000 comments, on January 13, 2011, EPA’s Assistant Administrator for Water signed a Final Determination under CWA Section 404(c) withdrawing specification of Pigeonroost Creek and Oldhouse Branch and their tributaries as disposal sites for discharges of fill material associated with the Spruce No. 1 Mine. This action prevented the burial of approximately 6.6 miles of streams in those watersheds. The Final Determination did not affect the permitted and ongoing fill in Seng Camp Creek.
- **Final Determination:** The Final Determination rested upon two separate and independent bases:
  - **Footprint effects:** Unacceptable adverse impacts to Pigeonroost Branch, Oldhouse Branch, and their tributaries, including the direct burial of 6.6 miles of high quality stream habitat and its attendant wildlife in the watershed that utilize these streams for all or part of their life cycles (e.g., macroinvertebrate, amphibian, fish, and water-dependent bird populations).
  - **Downstream effects:** Burial of Pigeonroost Branch and Oldhouse Branch and their tributaries would also result in unacceptable adverse effects on wildlife downstream through the contribution of contaminants to downstream waters.

#### **Prior D.C. Circuit Litigation:**

- EPA’s statutory authority under CWA 404(c)

- Mingo Logan brought suit in the D.C. district court arguing that EPA did not have authority to act under 404(c) after permit issuance.
- On appeal, the D.C. Circuit held that “the text of section 404(c) does indeed clearly and unambiguously give EPA the power to act post-permit.” *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 615 (D.C. Cir. 2013), *cert denied* 134 S. Ct. 1540 (2014). In an opinion by Judge Henderson, joined by then-Judge Kavanaugh and Judge Griffith, the court reasoned that Section 404(c) “expressly empowers” the EPA to act “‘whenever’ [it] makes a determination that the statutory ‘unacceptable adverse effect’ will result.” *Id.* at 613 (quoting 33 U.S.C. § 1344(c)).
- *Reasonableness of EPA’s CWA 404(c) decision under the APA*
  - In a subsequent challenge, the D.C. Circuit upheld EPA’s 404(c) final determination as reasonable under the APA. *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 713 (D.C. Cir. 2016).
  - In an opinion by Judge Henderson, joined by Judge Srinivasan, the court held that EPA did not violate the APA in withdrawing specification of certain disposal areas from the permit; rather, it considered the relevant factors and adequately explained its decision. The court held that Mingo had waived one argument, finding that Mingo Logan did not argue the reliance-costs and compliance-history issue before the EPA or in district court. The court did not address whether or not costs, if properly raised to the agency, must be considered under 404(c) or the APA. The court also held that section 404(c) allows the EPA to consider the effects of spoil disposal downstream from the fill itself and downstream water quality may enter the equation.
  - In his dissent, then-Judge Kavanaugh wrote that the Agency “must consider both costs and benefits before it vetoes or revokes a permit under Section 404 of the Clean Water Act.” *Mingo Logan*, 829 F.3d at 730 (Kavanaugh, J., dissenting).

### **Ongoing Takings Litigation:**

- In 2017, United Affiliates and Mingo Logan Coal Co. (Mingo Logan) brought a claim against the U.S. alleging both categorical and regulatory takings resulting from EPA’s final agency action in 2011 under Section 404(c) of the Clean Water Act that was upheld by the D.C. Circuit.
- The parties stayed the litigation for EPA Region 3 to have preliminary discussions with plaintiffs about possible resolutions; the parties allowed the stay order to expire on October 29, 2018.
- On December 20, 2018, the U.S. filed a motion to dismiss, and on May 29, 2019, the court granted in part and denied in part the motion. The court

dismissed the plaintiffs' first claim, finding that they had not stated a categorical takings claim. The court concluded that the complaint contained allegations that the section 404 permit withdrawal deprived Plaintiffs from using their property for coal mining sufficient to state a regulatory takings claim under the *Penn Central* framework.

- On March 23, 2020, the court denied the U.S. motion for a protective order, finding that Plaintiffs are entitled to rely on evidence outside of the administrative record; however, the Court reserved ruling on any privilege claims until those claims are ripe.
- Discovery is ongoing, and under the court's scheduling order fact discovery will be completed by April 28, 2021 and expert discovery will conclude by August 25, 2021.
- In July, plaintiffs filed a motion to compel, questioning assertions of the deliberative process privilege over documents EPA has produced so far. The motion is fully briefed, and we are awaiting a decision.

**Background: Assessment of Takings Claim and U.S. Responses:**

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**Ex. 5 AC/AWP/DP**

# **Ex. 5 AC/AWP/DP**

# **Ex. 5 AC/AWP/DP**